Supreme Court, U. S.
FILED
DEC 31 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

October Term, 1980

No. 79-1032

Refrigerated Food Line, Inc., *et al., Petitioners*

V.

Republic Industries, Inc., *et al., Respondents.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

Max Von Erdmannsdorff
VON ERDMANNSDORFF, ZIMMERMAN, HANKINS, & SHANK
5600 N.E. Antioch Road
Kansas City, Missouri 64119

COUNSEL FOR PETITIONERS

INDEX

Opinions below..... 1
Jurisdiction..... 2
Questions presented..... 2
Constitutional provisions, statutes and rules involved..... 3
Statement of the case..... 3
Reasons for granting the writ..... 9
Conclusion..... 15
Appendix..... 16

CITATIONS

Cases:

Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965) cert. denied 382 U.S. 983 (1966).....13

Silvert v. Pennslyvania R. Co., 197 F.2d 371 (7th Cir. 1952).....13

Derr v. Safeway Stores, Inc., 404 F.2d 634 (10th Cir. 1968).....13

Dimick v. Schiedt, 293 U.S. 474 (1935).....13,14

Interstate Circuit, Inc. v. U.S. 306 U.S. 208 (1939).....14

Constitutional Provisions:

Fifth Amendment to the United States Constitution.....2,3,9,16

Seventh Amendment to the United States Constitution.....3,17

Fourteenth Amendment to the United States Constitution.....3,17

Statutes:
28 U.S.C. 1254.....2,18

28 U.S.C. 1331.....17

Rules:
Rule 50b, Federal Rules of Civil Procedure..3,19

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

Refrigerated Food Line, Inc., et al., Petitioners,

v.

Republic Industries, Inc., et al., Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

Refrigerated Food Line, Inc. and it above-named statutory trustees, Petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on September 11, 1979.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Missouri entered in Civil Action No. 74CV313W2 is unreported. The opinion of the Court of Appeals for the Eighth Circuit is reported at 605 F.2d 412 (1979) and the Memorandum Opinion of the District Court is set out in full therein.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was made and entered on September 11, 1979. Petitioners' Motion for Rehearing was denied on October 1, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Following jury trial of this action in district court, the jury found for Petitioner in the sum of $600,000.00. The district court entered judgment for Respondent notwithstanding the verdict and granted Respondent's alternative motion for a new trial. The district court's order was founded upon a single finding: that "[T]here was no evidence that after the defendant leasing company replevied its trailers from plaintiff truck line, that there were not a multitude of trailers which could be leased from other owners...." 605 F.2d 417 (1979).

This finding -- that there was no shortage of trailers -- was briefed and argued in the Eighth Circuit Court of Appeals. The Eighth Circuit affirmed on the basis that: "[W]e are satisfied that there is simply no substantial evidence, direct or circumstantial, that the defendants or any two of them entered into any conspiracy to drive RFL (Petitioners) out of business or to exclude it from the competitive leasing market for refrigerated trailers." 605 F.2d 419 (1979). The Eighth Circuit discussed the conspiracy issue in some detail, but not the "shortage of trailer" finding of the district court.

Petitioners seek review of two questions:

1. WHETHER PETITIONERS' FIFTH AMENDMENT RIGHT TO NOTICE AND OPPORTUNITY TO BE HEARD HAS BEEN VIOLATED BY THE COURT OF APPEALS AFFIRMANCE OF THE DECISION OF THE DISTRICT COURT ON A THEORY THAT WAS

NOT CONSIDERED OR PASSED UPON BY THE DISTRICT COURT AND CONSEQUENTLY WAS NOT BRIEFED OR ARGUED BY COUNSEL FOR EITHER SIDE IN THE COURT OF APPEALS.

2. WHETHER SUBSTANTIAL EVIDENCE WAS ADDUCED TO ALLOW A JURY TO FIND THAT THERE WAS A CONSPIRACY, COMBINATION OR AGREEMENT BY RESPONDENTS TO DAMAGE PETITIONERS IN THEIR BUSINESS OF PROPERTY

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth, Seventh and Fourteenth Amendments to the United States Constitution, and Rule 50b of the Federal Rules of Civil Procedure are set forth in pertinent part in the Appendix at pp.16 to 19.

STATEMENT OF THE CASE

The Petitioners joined together in 1969 to form Refrigerated Food Line, Inc., (TR. 51). The company intended and for two years, did haul frozen meats and other meat by-products from the midwest to points in the southeastern portion of the United States (TR. 56). When forming the company, the Petitioners purchased the prerequisite operating authorities for their intended interstate operation from a trucking company operating out of Springfield, Missouri, Billyeu Transport, Inc. These authorities were being operated properly pursuant to a grant from the Interstate Commerce Commission (TR. 111). The total initial investment by the Petitioners was nearly $290,000.00 (TR. 47, 48).

At the time of the formation of Refrigerated Food Line, Inc., (hereinafter RFL), the type and quantity of trucks and refrigerated trailer units necessary to effectively meet their business goals were in short supply (TR. 48, 63, 184). They were, however, able to lease a number of older tractor/trailer units from World Leasing Company, which at that time in 1969 was owned and operated by Earl Lewis (TR. 46), a person who at that time was not connected with any of the Respondents. The rates were less than what RFL would have been required to pay had they been leasing new trucks (TR. 95). These rates were also substantially less than the cost of purchasing refrigerated trailer units. The availability of this arrangement was, in fact, the premise upon which the company was formed (TR. 177). There were other additional factors which entered into the lesser rate charged by World Leasing, Inc. The most notable among them was the fact that RFL promised to lease any tractor/trailer returned to World Leasing, Inc. by other users within a short period of time thereafter (TR. 60). This enabled World Leasing, Inc. to keep its equipment in constant use with a resulting constant flow of revenue in its behalf.

RFL's agreement with World Leasing, Inc., was the same as the agreement World Leasing, Inc., had previously with Billyeu Transport, Inc. (TR.178), the company from which RFL purchased its Interstate Commerce Commission authorities. World Leasing allowed Billyeu to run 60 to 90 days in arrears and offered and then followed the same arrangement with RFL.

In the fall of 1969 and the early winter of 1970, RFL was able to lease additional tractor and trailer units, from Cook Leasing and Rapid Way. (TR. 6). Due to the scarcity of trucks at that time, delivery

was not to be until the lat summer of 1970 (TR. 63). These units were intended to supplement the original fleet operated by RFL and obtained largely from World Leasing, Inc., so as to enable it to move steadily and properly toward the initial goad of obtaining and placing 50 tractor/trailer units in service (TR. 62, 68, 184). This level of operation was, in the opinion of investors, and in fact, that which was necessary to produce the profit which should reasonably be expected from their investment (TR. 68).

In late 1969 or early 1970, World Leasing, Inc., was sold to Republic Industries, a Respondent named herein (TR. 63). Republic Industries is a holding company which also then owned and still operates Riss International Corp. Republic Industries then owned the leasing company and the trucking company that are Respondents in this action (TR. 224, 225). Immediately after World Leasing was purchased by Republic Industries, Riss began making several applications to the Interstate Commerce Commission as a potential competitor of the newly formed RFL. Riss asked for operating authorities from the same points in the Midwest that RFL was serving to the identical locations in the southeast that RFL was serving (TR. 64, 86). If successful, Riss would be carrying meat and would need the same type of refrigerated equipment World Leasing was leasing to RFL. These repeated attempts to obtain operating authorities from the Interstate Commerce Commission failed (TR. 125, 166-67). RFL steadfastly and consistently opposed any and all applications offered by Riss, and the referees of the Interstate Commerce Commission often based their opinions, denying the applications, on the fact that no need was demonstrated by Riss for additional authorities in that the companies who then had the authorities, i.e. RFL and others, were doing

a satisfactory job in handling the load (TR. 166-67).

By early summer of 1970, RFL had opposed and Riss had been denied several temporary operating authorities. It was then that World Leasing, Inc., unilaterally, without notice, raised the lease charges on their tractor/trailer units being leased to RFL, adding a $40.00 per day charge on all tractors and a $25.00 per day charge on all trailer units(TR. 66, 181). The uncontradicted testimony at trial was that these rates were "ridiculouc" (TR. 66). and not at all competitive. They were, in fact, tantamount to a cessation of business. At that point, refrigerated unites were scarce and neither the investors and operators of RFL nor any prudent trucking firm could meet the increase and operate at a profit. World Leasing then reneged on its 90 day payment agreement and replevied its equipment -- one-third of the RFL fleet. The units replevied by World Leasing were placed in operation with Riss International (TR. 127, 230, 316).

With one-third of its fleet gone, and even with the additional units which had been contracted for in late 1969, RFL was unable to keep its gross expenses low enough to allow it to stay in business. The units which had previously been contracted for were intended to supplement those provided by World Leasing, Inc., and thereby move RFL closer to obtaining its goal of 50 units (TR. 62, 68, 184). Although RFL had been operation at a profit for the first six months of calender year 1970 before its equipment was taken in World Leasing's replevin action, it was unable to sustain that profit thereafter, leading RFL to its financial demise (TR. 259).

With RFL unable to agressively oppose Riss International in tis contained requests for temporary operating authorities from the Interstate Commerce Commission, Riss did, in fact, receive the I.C.C. authorities that had previously been served by RFL.

Riss succeeded in large part on the grounds that RFL, then short of equipment, was unable to sustain its operation (TR. 166-67, 223) for additional authorities. Because RFL ceased operation June 30, 1971, and was thereafter disbanded, this action was brought in the names of the trustees for RFL and the case was submitted to the jury upon a Section 1 violation of the Sherman Act, 15 U.S.C. 1, which makes illegal a conspiracy or combination, having as its object or effect, a restraint of interstate trade and commerce, whether accomplished by legal or illegal means.

On May 24, 1978, the jury returned a verdict in favor of the Petitioners, finding that they were damaged in the amount of $600,000.00. On July 24, 1978, Judge William R. Collinson entered his Memorandum Order awarding attorneys fees in the amount of $100,000.00. On August 25, 1978, the Court entered its Judgment Entry awarding the Petitioners the sum of $1,825,123.45; said sum representing the trebled jury verdict plus attorneys fees set off by $74,876.55 from the judgment of the Circuit Court of Greene County, Missouri of May 12, 1972, and the accrued interest thereon.

Subsequently, the Respondents moved for Judgment Notwithstanding the Verdict and in the alternative a New Trial.

In memorandum and order dated December 29, 1978, the Honorable Judge William R. Collinson granted the Repsondents Motion for Judgment Notwithstanding the Verdict and Alternative Motion for New Trial.

The court concluded that "there was no evidence thaat after the Respondent leasing company replevied its trailers from Petitioner truck line that there were (sic) not a multitude of trailers that could be leased from other owners, and, in fact, Petitioners own records demonstrated that it thereafter operated a larger fleet of leased

trailers than the small fleet it had leased from one of the Respondents."

In the alternative, Judge Collinson granted Repsondents motion for a new trial, and stated three reasons in support of that ruling, each dealing with the issue of damages. Each of the three issues is set forth in full as follows:

> "1. It was error to admit into evidence and allow (Petitioners') expert to testify from the financial analysis and projections which the expert stated was not prepared under any approved or recognized accounting methods.
>
> 2. It was error to give the (Petitioners') requested instruction authorizing recovery of anticipated lost profits, because there was no evidence from which such damages could be computed without the most flagrant speculation and conjecture.
>
> 3. The verdict awarding damages in the amount of $600,000.00 was not based on a scintilla of evidence in the case, and was so excessive as to demonstrate bias and prejudice against the (Repsondents) by the jury."

REASONS FOR GRANTING THE WRIT

I. PETITIONER'S FIFTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW HAVE BEEN VIOLATED DUE TO A LACK OF NOTICE AND OPPORTUNITY TO BE HEARD ON AN ISSUE DEEMED DISPOSITIVE BY THE EIGHTH CIRCUIT COURT OF APPEALS.

Both the United States District Court for the Western District of Missouri and the United States Court of Appeals for the Eighth Circuit agree that Petitioners failed to prove a prima facie violation of Section One of the Sherman Act. The courts do not agree on which element was left unproven, however. While Petitioner's earnestly argue that a submissible case was made, we further contend that in affirming the decision of the district court on a theory never addressed in the district court opinion or argued before the appellate court, the court of appeals has denied Petitioner's due process of law.

Due process requires, at a minimum, that litigants (or appellants) be fairly appraised of the basis of a court's ruling. When access to a higher tribunal is granted, the access must be meaningful in that the litigant should have an opportunity to be heard on relevant questions of law.

In the instant case, the district court entered judgment non obstante verdicto (hereinafter j.n.o.v.) following a substantial jury verdict. The court's brief, stated grounds for granting the motion are set out in full in the court of appeals opinion. 605 F. 2d 412,417 (1979). Stripped of irrelevancies and ignoring for the moment the court's conditional grant of

a new trial, the order states simply that the Petitioners failed to prove damage to their business as a result of their failure to acquire substitute trailers for those replevied by the Respondent. While Petitioners again renew their contentions that this finding is erroneous and that the underlying factual determination should have been left to the jury, it is significant to note that the district court did not grant Respondent's motion for j.n.o.v. due to the failure of the Petitioners to prove a consipracy, combination or agreement. Indeed no other element of a Sherman § 1 violation was even mentioned as being absent for the purposes of granting the motion. Upon reading the court's memorandum opinion, the Petitioners concluded, as any reasonable litigants would, that their proof was deemed insufficient by the trial judge only in that one particular element. Petitioners could reasonably conclude that in order to reverse the decision of the district court, they must brief and argue that single issue before the Eighth Circuit in a successful fashion. That is precisely what Petitioners did - - no other element of an antitrust offense was argued by either party on appeal because no other element was considered lacking by the district court.

The Eighth Circuit took a different approach to the motion, however. Instead of finding that the actions of the Respondents were not damaging to Petitioners, the court of appeals said that the Respondents actions could not be characterized as a consipracy. The court wrote at 419:

> Aside from the question of whether plaintiff was damaged as a result of the

> action of World in filing and prosecuting its replevin suit and advising plaintiff that rates would be raised and that plaintiff would be required to keep its rental payments current, we are satisfied that there is simply no substantial evidence, direct or circumstantial, that the defendants or any two of them entered into any conspiracy to drive RFL out of business or to exclude it from the competitive leasing market for refrigerated trailers.(emphasis added).

Two arguments must be noted here. First, the court of appeals did not affirm the validity of the district court's opinion that Petitioners failed to adduce sufficient evidence of loss to their business as a result of a shortage of trailers. In fact, the only reference made to the issue in the entire opinion, the Eighth Circuit reached the opposite conclusion:

> There is substantial evidence of record to the effect that in the spring and summer of 1970 the supply of refrigerated trailers available for leasing was limited. There can be no question that RFL was injured to some extent in its business by its loss of the eight trailers and three tractors that it had leased from World, and that it also suffered because it could not replace that equipment at the same rates or on the same payment terms that had prevailed as between RFL and World prior to June, 1970.

It is true that the Eighth Circuit concluded that the loss of the trailers did not put Petitioners out of business. But, in the con-

text of a motion for j.n.o.v., such a conclusion is immaterial. Whether or not the plaintiffs in an antitrust suit are "put out of business" by a restraint of trade, they may still be compensated for any damage sustained to their "business or property." It may be that the entire failure of RFL may not be attributed to the replevin, but that is merely a question of damages, not a failure to make a submissible case under Sherman § 1. Because the Eighth Circuit concluded that some damage was sustained it is clear that the position of the district court was not adopted by the court of appeals.

Second, the appellate judgment rested therefore on its finding that Petitioners failed to prove a conspiracy to restrain trade on the part of Respondents. As will be argued infra,this finding is erroneous. What is of more concern is its effect on the fairness of the proceeding.

Simply put, Petitioners were never permitted to present the arguments, legal and persuasive, in support of their position that a conspiracy, combination or agreement was proven sufficiently to permit a jury finding on the issue. The Court of Appeals, without guidance from the district court or the argument from counsel affirmed a decision on a theory that the trial court might never have accepted. The practice is particularly unfair in light of the fact that the trial court,blessed with the opportunity to access the credibility of the witnesses whose motivation as officers of the Respondent corporations was at issue, did not find proof of conspiracy lacking.

Elsewhere in this Petition, Petitioner will pray that the proceedings be remanded to the district court with instructions to enter judgment in accordance with the verdict or, in the alternative to begin a new trial on the issue of damages. However, if this relief may not be granted, Petitioner should be afforded an opportunity to carefully brief and argue its position on the "conspiracy question" before the Eighth Circuit Court of Appeals. It is fundamentally unfair for the opportunity to appeal a judgment to a higher authority to be rendered meaningless by completely unforeseeable judicial action.

II.THE EIGHTH CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THAT PETITIONERS FAILED TO ADDUCE SUFFICIENT EVIDENCE TO PERMIT REASONABLE PEOPLE TO CONCLUDE THAT A CONSPIRACY EXISTED BETWEEN AND AMONG THE RESPONDENTS.

The Eighth Circuit properly noted that its standard for review of the evidence in ruling on the propriety of a j.n.o.v. is the same as that of the district court. Like the trial court, courts of appeal are not free to reweigh the evidence and set aside a verdict merely because the judge feels that other results are more reasonable. Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F2d 532 (2d Cir. 1965), cert. denied 382 US.983 (1966). The court must determine if there is any evidence authorizing the jury's verdict. Silvert v. Pennsylvania R. Co, 197 F.2d 371 (7th Cir. 1952). The affirmance of a j.n.o.v. is justified only if the evidence is so overwhelmingly preponderant in favor of the movant as to admit of no other reasonable conclusion. Deer v. Safeway Stores, Inc., 404 F.2d 634 (10th Cir. 1968). In light of this narrow standard of review and the Supreme Court's stated preference for trial by jury, Dimick v. Schiedt,

293 U.S. 474 (1935), the court of appeals erred.

The uncontroverted evidence adduced at trial is this: The three defendant (Respondent) corporations were all part of Republic Industries under the control of Robert Riss and with interlocking directorates. Riss International was attempting to get I.C.C. authority to haul meat from Whchita, Kansas to the Southeast and was being opposed by RFL (Petitioner). Without the use of the additional trailers and without the demise (at least temporary) of RFL, the authorities could not be obtained. The rates at which RFL could lease refrigerated trailers from Respondents were raised to non-competitive levels. Once RFL failed to pay the higher rates, the trailers were replevied and immediately put to use by Riss International.

Even in the absence of direct proof of discussions or agreements between the Respondent companies, it is obvious that a jury could reasonably infer a conspiracy from proof of a business motion for the acts and the chain of events leading to the replevin. The fact of common ownership and unity of business purpose has been held sufficient to infer a combination or agreement. Interstate Circuit, Inc.,v. U.S. 306 U.S. 208 (1939).

It is no answer to say, as the court of appeals did, that the competitive position of Riss was not significantly improved by the addition of eight trailers and three tractors to its fleet. That was only half of the story. The jury could have inferred that the motive for the conspiracy was to reduce RFL's fleet, thus making Riss' application for I.C.C. authorities seem better by comparison.

Six reasonable people, properly instructed as to the law by the court, found that Respondents conspired to damage the plaintiff. Four other reasonable people, only one of whom watched the witnesses testify, disagree. Honest, reasonable disagreements are to be resolved in favor of juries and the appellate court should have so found. The verdict should be reinstated.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition be granted and a writ of certiorari issue.

MAX VON ERDMANNSDORFF
Counsel for Petitioners

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. _____

Refrigerated Food Line, Inc., et al., Petitioners,

v.

Republic Industries, Inc., et al., Respondents.

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public daner; nor shal any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. 1331

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter incontroversy exceeds the sum or value of $10,000.00, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000.00, computed without regard to any setoff or counter-claim, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

28 U.S.C. 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

1. By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

2. By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ or certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

3. By certification at any time by a court of appeals of any question of law in any civil or ciminal case as to which instructions are desired, and upon such certificaiton the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

RULE 50 (b), FEDERAL RULES OF CIVIL PROCEDURE

(b) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as is the requested verdict had been directed or may order a new trial.